In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 20

STATE OF CALIFORNIA and BOARD OF STATE HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR,

Appellants,

vs.

UNITED STATES OF AMERICA and UNITED STATES MARITIME COMMISSION, ENCINAL TERMINALS, HOWARD TERMINAL, and PARR-RICHMOND TERMINAL CORPORATION,

Appellees.

APPELLANTS' PETITION FOR REHEARING.

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APPELLANTS' PETITION FOR REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Come now the State of California and the Board of State Harbor Commissioners for San Francisco Har-

bor, appellants above named, and respectfully petition this Honorable Court to grant a rehearing in the above entitled cause, upon the following grounds:

GROUNDS FOR PETITION.

Without touching upon any other questions, or conceding that the judgment appealed from should not have been reversed on other grounds, appellants address themselves to the questions upon which the Court was divided, as shown by the majority and dissenting opinions.

The decision of the Court in this cause turned upon the conclusions reached in the majority opinion as to the power of the United States Maritime Commission, under the Shipping Act, 1916, as amended, to fix rates for wharf demurrage and storage.

The chain of reasoning in the majority opinion may be summarized as follows:

The wharf demurrage and storage rates of appellants were found by the Commission to be furnished below cost; free time on the facilities of defendants was unreasonably long or unreasonably extended, and amounted to a wastage of valuable space without any compensation therefor; both of these conditions cast a burden upon nonusers of excessive free time or wharf demurrage and storage services by shifting the burden of supplying sufficient revenue "to those who paid appellants for other terminal services such as docking of vessels, loading and unloading, and transportation privileges over and through the terminals"; this shifting of burden was a discrimination in viola-

tion of Sections 16 and 17 of the Shipping Act. Having found the discrimination to exist, the Commission was empowered by the Act to make and issue appropriate orders to do away with the discrimination; the fixing of minimum rates for wharf storage and services for the purpose of preventiing such discrimination was legally authorized by Sections 16 and 17 of the Act.

We think the Court fell into error in two respects: first, the record does not disclose any actual discrimination; secondly, if a discrimination did exist, the Commission was not empowered to remove it by prescribing a minimum rate for wharf storage and demurrage.

1.

THERE WAS NO DISCRIMINATION.

The theory of burden-shifting adopted by the Court may be succinctly stated as follows: When a port authority subject to the Act has different sets of rates for different services and when it furnishes one kind of service at rates which will not produce revenues sufficient to pay the cost of that particular service, including carrying charges for the facilities which furnish it, the port authority must impose higher rates for other services than it would otherwise charge, in order that the port authority shall not lose money on the whole enterprise. As a result, a user of such other services who is a nonuser of the noncompensatory service has to pay a higher charge than

he would have to pay if the charges for the last mentioned service were compensatory.

In this case, the theory of burden-shifting is but an empty formula; that is to say, there is no showing in the record that the charging by appellants of the asserted noncompensatory rates of wharf demurrage and storage actually resulted or even had a tendency to result in the imposing of higher rates for other services used by persons who did not use the noncompensatory service.

Under the provisions of Sections 3080 and 3084 of the Harbors and Navigation Code of California, the Board of State Harbor Commissioners of San Francisco Harbor, hereinafter called the "Board" is forbidden to make charges beyond the cost of furnishing facilities and administering them. There is, however, no legal prohibition against making port charges which will not produce revenue sufficient to pay the cost of furnishing such facilities and paying for their administration because neither the Constitution nor the laws of the State of California prevent the legislature of the State from supplementing the revenue of the Board of State Harbor Commissioners by appropriations from State funds other than those produced by port charges.

This being so, appellants in operating the Port of San Francisco are free from the economic necessity which compels ports which are privately owned and operated to make income at least square with outgo.

On account of this difference between the publicly owned and operated harbor of appellants and pri-

vately owned ports, it is at once seen that there is no room for the operation of the theory of shifting the burden, unless it is shown that the loss occasioned by the noncompensatory character of one service is actually made up by the imposition of higher rates for other services. There is no such showing in the record in this case.

The record, as interpreted by the government in this case, shows that harbor activities as a whole are furnished at rates which are noncompensatory. From data in the record relied upon by the government in its brief, page 56, it appears that, if depreciation be taken into account, the State incurred deficits in the operation of the harbor of $1,405,634 and $1,285,786 for the years 1939 and 1940, respectively. In Appellants' Reply Brief, it was shown by the record that the total revenues for those years, respectively, amounted to $2,380,822.06 and $2,483,253.87. From those figures, the conclusion follows that for each of these two years the revenues of the harbor would have had to be increased by 50 per cent in order that the revenues might equal expenses, including depreciation, interest on bonds, etc.

It is also shown in Appellants' Reply Brief, page 14, by a quotation from the government's expert witness, Differding, (R. 716), that an increase of 33⅓ per cent of revenue for wharf demurrage and storage would be necessary in order to make the charges for those services compensatory.

The only conclusion that can be drawn from these data is that the revenues of the harbor from services

other than wharf demurrage and storage were lower comparatively than the revenues derived from wharf demurrage and storage. Assuming the correctness of these data, it is clear that the alleged noncompensatory charges of appellants for wharf demurrage and storage did not at any time prior to the hearing before the Commission, directly or indirectly, cause or result in charges for services other than wharf demurrage and storage which were relatively higher than the charges for wharf demurrage and storage.

Furthermore, as shown on pages 15 and 16 of Appellants' Reply Brief, it appears from the Commission's Report, accompanying its Order of September 11, 1941, fixing minimum wharf demurrage and storage rates, that the Order would result in increases of revenue at only two of appellants' wharves, viz., Piers 45 and 56; that this increase of revenues at these piers, intended by the Commission to bring in sufficient revenue to make the charges compensatory, would be only $6,844.63; and that the total amount of tolls and dockage collected by appellants in 1940 was $1,044,130.99.

The conclusion follows that the so-called transfer of burden would consist of adding $6,844.63 to $1,044,130.99—an increase of 6/10ths of 1 per cent—an unsubstantial and negligible percentage of increase, which, under the *de minimis* rule, should be wholly disregarded.

Considering this unsubstantial amount, together with the fact that appellants' charges for services other than wharf demurrage and storage were not

relatively higher than their charges for wharf demurrage and storage, it is clear that there was no shifting of the burden from the users of one type of service to the users of other types.

The facts in this case are very different from those in *Baltimore & Ohio R. Co. v. United States,* 305 U. S. 507, relied upon by the Commission and the government and cited in the majority opinion herein. Here there were no "favored" or "selected" persons receiving special rates as there were in the *Baltimore & Ohio* case. Neither is there any proof that appellants' revenue from wharf demurrage and storage was less than "out-of-pocket" cost as contrasted with the situation in the *Baltimore & Ohio* case where the charges for storage produced revenue which was less than the "out-of-pocket" costs.

Appellants' rates of wharf demurrage and storage were open to all shippers and consignees who applied for them, and whose goods were of the class or classes to which the rates applied. All shippers who were charged for other services furnished by appellants were free to apply for and use the wharf demurrage and storage services on the same terms.

We submit, therefore, that there is no basis for the conclusion there was any discriminatory practice by appellants which could be a foundation for the Commission's Order of September 11, 1941, requiring appellants to charge prescribed minimum rates of wharf demurrage and storage.

Consequently, the Order of the Commission was not justified or warranted by the facts.

2.

THE UNITED STATES MARITIME COMMISSION HAS NO POWER TO FIX RATES OF WHARF STORAGE OR DEMURRAGE.

The final step in the reasoning in the majority opinion in this case is that, having found that the alleged discrimination above mentioned constituted a violation of Sections 16 and 17 of the Shipping Act, 1916, as amended, consisting of unreasonable preferences and advantages and unjust and unreasonable practices, by appellants, the Commission may fix a minimum rate of wharf storage and demurrage to be charged by appellants for the use of their harbor facilities in order to remove such alleged discrimination.

This conclusion is arrived at in the face of the sharp distinction made in Sections 17 and 18 of the Act between rates or charges on the one hand and regulations or practices on the other. That there is such a distinction is shown by the provisions of these sections from which we quote as follows:

"Sec. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or col-

lecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

"Sec. 18. That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs; and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

* * * * * * *

"Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

We quote also the pertinent part of Section 16 of the Act, as follows:

> "Sec. 16. * * * That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—
>
> "First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * * "

Sections 17 and 18 deal with two separate powers of the Maritime Commission, *the power to regulate rates and charges,* and *the power to establish and impose just and reasonable regulations and practices.*

It is admitted both in the order of the Commission and in the majority opinion that the power of the Commission to regulate rates and charges applies only to carriers by water and that the Commission has no power to fix or determine or regulate the rates or charges of "other person(s)" subject to the Shipping Act, such as persons furnishing wharf facilities or services.

With respect to the second power above mentioned, it is clear that the Commission has power to "determine, prescribe and order enforced a just and reasonable regulation or practice":

(1) "relating to or connected with the receiving, handling, storage or delivering of property" by either a common carrier by water in foreign or interstate commerce, or any "other person subject to this Act", or

(2) relating to any rate, fare, charge, classification or tariff established by a common carrier by water in interstate commerce.

The power to prescribe a regulation or practice of such "other person", that is to say, a person furnishing wharf facilities, is distinct and separate from the power to prescribe a regulation or practice as to rates or charges, since the last-named power may be exercised only as to common carriers by water in interstate commerce.

Notwithstanding the lack of power in the Commission to fix rates of persons furnishing wharf facilities or services, the Commission, by its Order of September 11, 1941, did fix minimum rates of wharf demurrage and storage and directed that such rates should be put into effect by appellants and other port authorities.

With regard to this Order, the majority opinion says:

> "But the Order of the Commission, though it pertains to demurrage charges, is not an exercise of *conventional rate-making.*" (Emphasis ours.)

To say the least, this statement is ambiguous, as the meaning of the word "conventional", as used in the sentence, is not clear.

From a consideration of the remaining part of the paragraph in which the word is used, we take the quoted statement to mean that the Order of the Commission establishes rates for wharf demurrage and storage only under special circumstances and for a particular purpose, to-wit: to prevent a purported discrimination which has no support in the record. This must be the meaning intended, for it is further stated that "the withholding of rate-making power for services other than water carriage does not qualify the *unlimited grant* to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property." (Emphasis ours.)

The opinion then proceeds to say that having this unlimited grant of power, the Commission may correct the "preferential and unreasonable results of noncompensatory charges" by requiring compensatory charges, that is to say, by fixing minimum rates of charges. All this, the opinion says, may be done under the Commission's power to establish a "just and reasonable regulation and practice."

Here we find a denial that the Commission has rate-making power as to wharf demurrage and storage, coupled with veiled and obscure language from which is drawn an inference that the Commission has an implied power to fix such rates in aid of its express power to make and enforce a "just and reasonable regulation and practice."

We submit that, if this conclusion is allowed to stand, it will amount to nothing less than judicial

legislation. The vice of the reasoning of the majority opinion is the assumption that the Shipping Act vests the Maritime Commission with an implied "unlimited grant" of power to use any means that it deems fit, including rate-making, to enforce a "practice" or a "regulation" established by the Commission.

This assumption is made, as the dissenting opinion truly states, "in the teeth of the plain words of the statute as enacted". This is apparent from the provisions of Sections 16 and 17 of the Act, which withhold from the Commission the rate-making power as to persons furnishing wharf facilities and services. No assumption of "unlimited grant" of power should be indulged in the absence of a specific grant of power to the Commission to enforce regulations or establish a practice by fixing minimum rates. By indulging such assumption or presumption, whichever it may be, the Court usurps the legislative function.

We agree, also, with the position taken in the dissenting opinion that the assumption of such "unlimited grant" of power amounts to reading into the Shipping Act, 1916, as amended, an additional provision that the Commissioners may establish minimum rates and charges for the use of wharf facilities and that such judicial enlargement of the provisions of the Act is all the more to be condemned when it operates as it does in this case to interfere with the power of a State agency conferred by the State Legislature to operate state-owned port facilities at lower rates than obtained in privately operated ports, if

such State agency deems it advisable in the public interest, to do so, for the purpose of encouraging the flow of commerce through its own ports.

We are convinced, also, that the dissenting opinion is correct when it states that the case of *Baltimore & Ohio R. Co. v. United States,* supra, does not support the order of the Commission. As explained in the dissenting opinion, that case arose under the Interstate Commerce Act. Under Section 15(1) of that act a power is given to the Interstate Commerce Commission to establish "regulations and practices" as to rates of transportation by rail in interstate commerce. It was properly held in the *Baltimore & Ohio* case that there was a violation of this section and Sections 3(1) and 6(7) of the Act by a practice of the carrier, which consisted in furnishing wharf storage rates at less than "out-of-pocket" cost to selected and favored shippers, because the practical result of this practice was to give a rebate of a transportation rate by rail to the persons making use of the below-cost wharf storage. The Order of the Commission, which was upheld in that case, forbade the continuance of the practice. In taking this action, the Commission acted within the orbit of its powers to prevent discrimination by the carrier in the application of its transportation rates.

In the case now before the Court, there is no question of discrimination in the application of a rate of a carrier. This case involves rates of persons furnishing wharf facilities and services which were furnished to all shippers and consignees applying for

the same at the established and published rates, and, as we have shown, without discrimination against any one of such persons.

Neither does the Order of the Commission find any support in *United States Nav. Co. v. Cunard*, 284 U. S. 474, 487, or *Warehouse Co. v. United States*, 283 U. S. 501, 513. The first of these cases involved the propriety of two sets of transportation rates established by a navigation company between the same two points, and the denial to certain classes of shippers of the lower of the two rates. The Court held that this practice should be prohibited. The condemnation of this practice, without imposing or fixing any rate for transportation service, was clearly within a power granted to the Maritime Commission by the Shipping Act of 1916.

The second of the two above mentioned cases arose under the Interstate Commerce Act, and dealt with discriminatory practices which consisted of the favoring by an interstate carrier by railroad of certain warehouse companies as shippers over other warehouse companies standing in the same relation to the railroad. The discriminatory practices consisted in payments made by the railroad to the favored companies, and not to others, for the performance of loading and unloading and other services which the companies performed for their own patrons but not for the railroad, thus giving the favored warehouse companies a preference and advantage over the other warehouses.

In both of these cases, the remedies afforded the complainants consisted in the condemnation and forbidding of the unlawful practices. These remedies were within the powers of the Commission. These cases are in contrast with the case at bar, in which the remedy, to-wit: regulation of a rate of a person furnishing a wharf facility is not within the power of the Commission.

3.

THE UNITED STATES MARITIME COMMISSION HAS NO JURISDICTION OVER WHARF STORAGE IN ANY RESPECT.

It is the firm conviction of the appellants, stressed in their briefs and argument that the Maritime Commission not only has no power to fix rates of wharf storage or demurrage, but has no jurisdiction in any respect over the general subject of wharf storage. Manifestly, if it lacks power generally over the subject matter, it has no power to fix minimum rates of wharf storage or demurrage.

In the majority opinion this contention of appellants was summarily disposed of in the following statement:

> "There can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the commission."

It is not clear from this statement whether it applies only to property remaining on a wharf during

the allowable free time for the assemblying of cargo by the shipper prior to shipment or the removal of the same by the consignee after unloading by the carrier, or whether the statement applies also to property which, after the expiration of free time, is left in storage on the wharf by agreement between the shipper or the consignee and the party furnishing the wharf facilities.

We think it is clear that the statement is not correct if applied to the latter situation, and if incorrect as to this situation, the order of the Commission as to wharf demurrage and storage rates cannot stand.

Without going into detail, we call attention to the case of *Armour and Co. v. Alton R. Co. et al.* (C C.A.–7th), 111 Fed. 2d, 913, 915, in which the Court said with regard to stockyard service:

> "It might be said that in the rendition of a transportation service the Yards Company acts as agent of the carriers, but that in the performance of a stockyard service it acts as agent of the packer. *Adams v. Mills,* supra, * * *. It has also been said that 'Stockyard services do not commence until unloading ends; they end when loading begins' * * *."

To the same effect is *Swift & Co. et al. v. United States,* 316 U. S. 216, 86 L. Ed. 1391, 62 S. Ct. 948.

In *Ex Parte* 104, *Propriety of Operating Practices,* New York Warehousing, in the decision in 198 I. C. C. 134, affirmed on rehearing in 216 I. C. C. at 292, the Commission said, at page 195:

> "While the storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to the transporting of such property. To be incidental business *the storage must be preliminary either to immediate transportation or immediate removal.*" (Emphasis added.)

The net result of these authorities is that wharf storage cannot be held to be furnished "in connection with a common carrier by water", as it is not a part of transportation.

The definition of "other person" in the first section of the Shipping Act, 1916, is worded as follows:

> "The term 'other person subject to this act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with a common carrier by water.*" (Emphasis added.)

The conclusion cannot be escaped, therefore, that wharf storage is not furnished "in connection with a common carrier by water", and on account of this limitation contained in the definition of "other person", it must be held that the Maritime Commission has no jurisdiction whatsoever over the subject of wharf storage or the rates charged therefor.

For all the foregoing reasons, petitioners respectfully request that this Petition for a Rehearing be granted, and that the final decree of the United States District Court for the Northern District, appealed from, upon further consideration, be reversed.

Dated, San Francisco, California,
January 20, 1944.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the above named appellants and petitioners do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated, San Francisco, California,
January 20, 1944.

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Attorney General of the State of California,

LUCAS E. KILKENNY,
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Counsel for Appellants and Petitioners.

Due service and receipt of a copy of the within Petition for Rehearing of Appellants is admitted this .....day of January, 1944.

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